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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 814

PAUL W. SAMPSELL, as Trustee in Bankruptcy for the Estate of New Wells Market, a copartnership consisting of Shoo Hoo Kim Ying, *et al.*,

Petitioner,

vs.

SUN H. TOM,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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IN THE

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OCTOBER TERM, 1942.

No.....

PAUL W. SAMPSELL, as Trustee in Bankruptcy for the Estate of New Wells Market, a copartnership consisting of Shoo Hoo Kim Ying, *et al.*,

Petitioner,

vs.

SUN H. TOM,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

This is a petition for writ of certiorari to the Ninth Circuit Court of Appeals brought before this court under the provisions of Section 24-c of the National Bankruptcy Act (11 U. S. C. A., Section 47-c, and Section 240 of the Judicial Code (28 U. S. C. A., Section 347).

The jurisdiction of the District Court was invoked under the provisions of Sections 60-b and 67-d of the National Bankruptcy Act (11 U. S. C. A., Sections 97-b and 107-d), for the purpose of avoiding a preferential and

fraudulent transfer of the assets of a bankrupt copartnership.

The jurisdiction of the United States Circuit Court of Appeals was invoked under the provisions of Section 24-a of the National Bankruptcy Act (11 U. S. C. A., Section 47-a).

The judgment and decree of the District Court was entered on March 31, 1942. [Tr. p. 38.] The order of the Circuit Court of Appeals reversing the order of the District Court was entered on November 30, 1942.

A petition for rehearing was filed and was denied by the Circuit Court of Appeals on December 17, 1942.

The Opinion of the Appellate Court will be found in 131 Fed. (2d) 779, and in the Transcript of Record at page 276.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit, Requiring It to Certify to the Supreme Court of the United States for Its Revision and Determination the Appeal Taken by the Appellant, Sun H. Tom, Against Petitioner Lately Pending in Said Circuit Court of Appeals.

To the Honorable Harlan F. Stone, Chief Justice, and to the Associate Justices of the Supreme Court of the United States:

The petition of Paul W. Sampsell, as Trustee in Bankruptcy for the estate of the New Wells Market, a copartnership consisting of Shoo Hoo Kim Ying, *et al.*, Bankrupt, filed by virtue of the provisions of Section 24-c of the National Bankruptcy Act (11 U. S. C. A., Section 47-c), respectfully represents as follows:

First: That this cause involves a question of far-reaching importance to mercantile and business interests of the country, on which the Circuit Courts of Appeals are at variance, and involves a unique construction of the partnership provisions of the National Bankruptcy Act by the United States Circuit Court of Appeals for the Ninth Circuit, thus necessitating an authoritative determination thereupon by this court.

Second: The questions involved are as follows:

First: In an action brought by a trustee in bankruptcy for a copartnership consisting of eleven copartners to avoid a flagrantly fraudulent and preferential transfer of the bankrupt's assets, or a substantial part thereof,

made on the eve of the bankruptcy of said copartnership for the benefit of certain members of the copartnership and certain employees who were thoroughly familiar with the financial condition of the partnership business, is it necessary that the trustee before he is entitled to recover, demonstrate more conclusively to the trial court that none of the eleven copartners has assets available for the payment of the partnership debts where it is clearly established that some of the partners are in Midway Island, in the war zone, in China, in bankruptcy, and the whereabouts of many of them are unknown, in the face of the fact that the trustee obtained an order, after service by publication and otherwise, marshalling the assets of the eleven partners into the bankruptcy proceeding, but was unable to recover any assets under such order?

Second: Is a trustee in bankruptcy of a copartnership, in time of war, when certain members of said copartnership are either in invaded foreign countries or are in the war zone outside the territorial limits of the United States, required to pursue, examine, or bring before the court, such partners for the purpose of having them testify as to whether or not they have any individual assets, on the unfounded assumption that they *might* be possessed of sufficient assets to pay the liabilities of the copartnership in full, in an action brought by the trustee to avoid a fraudulent conveyance or preference by the bankrupt of the bankrupt copartnership's property?

That the proceedings had in the courts below in brief were as follows:

The New Wells Market, the bankrupt copartnership, was a copartnership operating under a fictitious name. The partnership was composed of eleven Chinamen named Chum Jom, Paul Dare, Fred Chaeng, George Lee, Thomas

Wong, Cluck Fook Quon, Tony Chew Kee, Chan Pong, Jang Lun Quong, Luke C. Kong and Shoo Hoo Kim Ying. [Plaintiff's Complaint, Tr. p. 2; Answer of Sun H. Tom admitting said allegation, Tr. p. 11.]

An involuntary petition in bankruptcy was filed on July 10, 1941, against this partnership and on July 16, 1941, an Order of Adjudication was entered. Petitioner on certiorari was elected trustee on July 29, 1941, and thereafter qualified. [Allegation II, Plaintiff's Complaint, Tr. pp. 2 and 3, and Answer of Defendant, Sun H. Tom, Tr. p. 11, admitting same.]

The bankrupt copartnership operated a store or market in the City of Los Angeles, and Shoo Hoo Kim Ying, one of the partners, was one of the managers of the partnership business. [Tr. p. 90.]

York K. Poon, one of the defendants who did not appeal from the judgment against him, was likewise a manager of the business and signed all promissory notes given by the partnership. [Defendant Tom's Exhibit "A," Tr. pp. 73 and 74.] All checks of the bankrupt were likewise signed by Shoo Hoo Kim Ying and York K. Poon. [Tr. p. 90.]

The defendant and respondent here, Sun H. Tom, was the bookkeeper for the copartnership. [Tr. p. 95.]

In the winter of 1940, a fire in the bankrupt's place of business burned all of the books and records up to January 1, 1941, or shortly before that. [Tr. pp. 95, 96.]

A new set of books was thereupon set up. [Tr. p. 96.] On July 10, 1941, an involuntary petition in bankruptcy was filed against the New Wells Market following an assignment for the benefit of creditors which had been made on July 5, 1941.

The defendant, York K. Poon, had been a partner in this large copartnership up to 1938 [Tr. p. 107], and Sun H. Tom, respondent here, had been the bookkeeper for the four or five years preceding the filing of the petition in bankruptcy. [Tr. p. 108.]

Sun H. Tom also occupied the status of a money lender to the bankrupt copartnership while acting as its bookkeeper. Over a long period of time preceding the assignment for the benefit of creditors and the adjudication in bankruptcy, Sun H. Tom had made numerous loans to the bankrupt evidenced by promissory notes executed on behalf of the partnership by Shoo Hoo Kim Ying, the managing partner, and York K. Poon, as manager. [Tr. pp. 73, 74.] These notes were demand notes carrying with them in lieu of interest a purported bonus amounting to approximately 25% of the principal, said bonus payable in some instances three years after the date of the promissory note, and in some instances five years thereafter regardless of when the principal was repaid. These notes amounted to a total of $66,160.00 advanced, and $60,-941.00 repaid, leaving a balance of $5,219.00 owing to defendant, Sun H. Tom. [Defendant Tom's Exhibit "C," Tr. p. 76.] The books of the copartnership as kept by the defendant, Sun H. Tom, however, showed at the close of business, July 5, 1941, a balance in Sun H. Tom's favor amounting to $27,059.00. [Plaintiff's Exhibit No. 8, Tr. p. 65; admitted in evidence, Tr. p. 247.]

On July 5, 1941, the date of the transaction which the trial court found constituted both a preference and a fraud, the bankrupt copartnership was in serious difficulties. Sun H. Tom had discontinued loaning it money even at the 25% bonus which the copartnership had been required to pay him. On April 12, 1941, he made his

last loan amounting to $6,000.00 which boosted his credit balance on the partnership books up to $37,980.00. Seven days later, on April 19th, he began to rapidly liquidate the loan reducing it on the books between April 19th and July 5th to $27,059.00. [Plaintiff's Exhibit No. 8, Tr. pp. 65, 66.] The bank account of the copartnership had been repeatedly overdrawn, the company running a continuous overdraft at the bank from and after April 12, 1941. [Tr. pp. 141, 143; Plaintiff's Exhibit No. 5, Tr. pp. 48, 49.]

It will be noted from an examination of Exhibit No. 5 that the overdraft at the bank reached an all time high in the month of June, amounting to $8,487.69 on one day of that month.

During this period, it will be noted from Plaintiff's Exhibit No. 8 [Tr. p. 66], Sun H. Tom was rapidly collecting back his money.

To make the situation even more crucial, a meeting of creditors was called on July 5, 1941, which was attended by York K. Poon, the manager, and Shoo Hoo Kim Ying. They were informed at that meeting that the store was going to be closed the next day. [Tr. pp. 98, 99.] The partnership had theretofore been placed on a C. O. D. basis by creditors. [Tr. pp. 101, 102.]

Friday, July 5, 1941, was collection day and a large sum of money was on hand at the time that Shoo Hoo Kim Ying informed the defendants that there was going to be a receiver put in charge of the bankrupt copartnership's business. [Tr. p. 103.] The time anticipated for the receivership was Monday, July 7th. Shoo Hoo Kim Ying had been unable to collect some of the accounts receivable because customers of the copartnership refused to pay in view of the impending receivership. [Tr. p.

104.] A conference was held on the evening of July 5, 1941, which resulted in the disbursal of funds on hand amounting to the total of $4,396.34 [see stipulation as to amount of judgment, Tr. p. 35], to Sun H. Tom $1,505.64, York K. Poon $1,503.99, Shoo Hoo Kim Ying, a partner, $260.43, Wallace Cheung, an employee, $515.25, Paul Dare, a partner, $379.03, Jung Lun Quong, a partner, $118.50, and Luke C. Kong, a partner, $113.50, or a total of $4,396.34. [See Findings of Fact, Tr. pp. 32, 33.]

No dispute exists as to the amount of preference or fraudulent conveyance involved. The judgment of the District Court was reversed solely on the ground that the Trustee had failed to prove insolvency on July 5, 1941, and in this respect we contend that the Circuit Court of Appeals was in error.

Your petitioner annexes hereto his brief in support of his petition.

Wherefore, your petitioner prays that a writ of certiorari may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record in all proceedings in said Circuit Court of Appeals in this case therein entitled Sun H. Tom, Appellant, vs. Paul W. Sampsell, as Trustee in Bankruptcy of the Estate of New Wells Market, a copartnership consisting of Shoo Hoo Kim Ying, *et al.*, Appellee, on petition of Sun H. Tom for review, No. 10180, to the end that said case may

be reviewed and determined by this court, as provided by law; and that the judgment of the said Circuit Court of Appeals in said case may be reversed by this Honorable Court and the judgment of the District Court affirmed.

And that petitioner may have such other and further relief as may seem meet and proper.

And your petitioner will ever pray.

PAUL W. SAMPSELL,
As Trustee in Bankruptcy for the Estate of New Wells Market, Bankrupt, Petitioner.

THOMAS S. TOBIN,
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Los Angeles, California,
Attorney for Petitioner.

FRANK C. WELLER,
817 Board of Trade Bldg.,
Los Angeles, California,
Of Counsel.

United States of America, Southern District of California,
Central Division, County of Los Angeles—ss.

Paul W. Sampsell, being by me first duly sworn, deposes and says: That he is the Trustee in Bankruptcy and Petitioner in the above entitled action; that he has read the foregoing Petition for Writ of Certiorari and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes is to be true.

PAUL W. SAMPSELL.

Subscribed and sworn to before me this 3rd day of March, 1943.

BESS A. ALDRICH,
Notary Public in and for the County of Los Angeles, State of California.

Certificate of Counsel.

I, Thomas S. Tobin, a member of the bar of this court, hereby certify that I believe the foregoing Petition for Writ of Certiorari is well founded and meritorious, and is not interposed for the purpose of delay.

THOMAS S. TOBIN.

IN THE

Supreme Court of the United States

October Term, 1942.

No.....

PAUL W. SAMPSELL, as Trustee in Bankruptcy for the Estate of New Wells Market, a copartnership consisting of Shoo Hoo Kim Ying, *et al.*,

Petitioner,

vs.

SUN H. TOM,

Respondent.

BRIEF IN SUPPORT OF PETITION.

In the case at bar, the Trustee was confronted by a rather unique situation. As stated in the question involved, this partnership was different from the ordinary American business copartnership which usually consists of two or three partners. This partnership consisted, as stated, of nine Chinamen, some of whom lived in China and on Midway Island, and others who had disappeared to parts unknown. One of them was dead, and two of them, Shoo Hoo Kim Ying and Paul Dare, had individually gone into bankruptcy. [See Order marshalling assets of individual partners, Tr. pp. 45, 46.] Confronted with this situation, the Trustee filed a petition in the bank-

ruptcy court for an order seeking to marshal the assets of the individual partners, if any, some of the partners being personally served, and publication of process having been had in the case of those who could not be located by the United States Marshal for personal service. [See Plaintiff's Exhibit No. 3, Tr. pp. 45, 46.] The Order to Show Cause on marshalling assets of the individual copartners was heard on October 23, 1941, before Referee Hugh L. Dickson. The defendant, York K. Poon, appeared in person and by counsel at the hearing. Shoo Hoo Kim Ying and Paul Dare, two of the partners, likewise appeared by counsel. None of the other partners appeared in any manner. [Plaintiff's Exhibit No. 3, Tr. p. 46.] The court accordingly made an order that all of the assets of the individual copartners be marshalled into the bankrupt estate. The Trustee put an adjuster in his office to work seeking to locate assets of these individual copartners, whom the United States Marshal had been unable to locate to serve process on in connection with the petition for an order marshalling their assets. [Tr. pp. 85, 86.] Mr. Sampsell received no assets whatsoever from any of these individual copartners. [Tr. p. 84.]

Not satisfied with this *prima facie* evidence that no more assets could be located, counsel for the Trustee examined the defendant, York K. Poon, manager of the business, thoroughly, with regard to the whereabouts and property of the various parties, beginning at page 91 of the transcript. Notwithstanding his intimate association with this partnership as a partner up until 1938, and his continued intimate association as manager of the copartnership thereafter down to the date of bankruptcy, the defendant, Poon, was unable to give us any information as to any property owned by any of the individual co-

partners, and but very little information as to their whereabouts. Beginning at page 91 of the transcript, we summarize the defendant's Poon's testimony with regard to these partners. Bearing in mind that the order of the Referee marshalling the assets had expressly found that two of the partners, Shoo Hoo Kim Ying and Paul Dare, were in bankruptcy [Tr. p. 46], the balance of the partners were accounted for as follows [Tr. p. 91 *et seq.*]: Chum Jom, whom the defendant, Poon, had known for a couple of years, was a partner. He was dead, having died the previous year. Poon knew of no property that he had. [Tr. pp. 91, 92.] Fred Chaeng was in Midway Island and Poon knew of no property belonging to Chaeng. Luke C. Kong, a partner, whereabouts unknown. Witness did not know of any property that he had as he left after the store closed. George Lee, a partner, left after the store closed, and Poon knew of no property that he had. [Tr. p. 92.] Thomas Wong was a partner, whereabouts unknown. Witness knew of no property which he had. [Tr. pp. 92, 93.] Cluck Fook Quon, a partner, and the witness knew nothing about his whereabouts or whether he had any property. Tony Chew Kee, a partner, whereabouts unknown, and the witness knew of no property belonging to him. Chan Pong, a partner, whereabouts unkown, and the witness knew of no property that he had. [Tr. p. 93.] Jang Lun Quong, was a partner, and the witness knew nothing about him because he was in China. [Tr. pp. 93, 94.] Jang Lun had gone back to China before the store was closed. Poon did not know anything about the whereabouts of any of the rest.

With this evidence on behalf of the Trustee as to the lack of either property or information leading to the location of any property belonging to these individual co-

partners, which stood on the record absolutely uncontradicted, the trial court concluded that the individual copartners had no property, at least within the territorial jurisdiction of the United States, and that the copartnership was absolutely insolvent; that the defendants, Poon and Tom, had partitioned the cash on hand on the eve of bankruptcy, among themselves, and certain of the partners who were present, that defendants knew or had reasonable cause to believe that the copartnership was insolvent and that the transfers of funds accomplished on the eve of bankruptcy was made pursuant to a conspiracy between these parties to hinder, delay or defraud creditors who were about to put the partnership into receivership, and for the purpose of preferring the beneficiaries under the distribution over other creditors. Despite the fact that the testimony adduced by the Trustee stood undisputed and uncontradicted, and despite the fact that the trial court had the opportunity of judging the credibility of witnesses, the Circuit Court of Appeals reversed the District Court's judgment, on the sole ground that the Trustee had failed to prove that the partnership was insolvent.

That the business itself was hopelessly insolvent is evidenced by the audit made by Messrs. Namson & Young, Public Accountants. This audit covered the period from March 8, 1941, four months prior to bankruptcy, and extended to July 10, 1941, the date of the filing of the petition. It was received in evidence as Plaintiff's Exhibit No. 6 commencing at transcript page 50. It was admitted in evidence at page 166 of the transcript.

This audit disclosed that on March 8, 1941, four months prior to the filing of the petition in bankruptcy the assets amounted to $66,078.10, and its total liabilities $67,951.60.

[See Tr. p. 52.] But that is not all. The asset figure was arrived at by including therein two items, "store and equipment" $21,935.72 and "actual cash paid, good will" $21,000, neither of which items constituted a real asset. With these two items eliminated the actual assets of the bankrupt copartnership amounted to approximately $25,000.

Analysis of Fictitious Items of Store and Equipment Account and Good Will Account.

We have made the bald statement that the two alleged assets consisting of the Store and Equipment Account and Good Will Account were not assets at all. We shall go further than that and state that the so-called Store and Equipment Account actually constituted a liability.

The defendant Sun H. Tom who was bookkeeper for the bankrupt copartnership had, as we have heretofore stated in the petition for this writ, occupied the status of a money lender to the copartnership, taking as evidence of such loans demand notes calling for a bonus of 25% of the principal. [See Plaintiff's Exhibit No. 8, Tr. p. 65.] On each of these transactions the note was made for the full amount of the loan and the so-called 25% bonus, but the partnership received only 75% of the amount of the alleged loan. The partnership was charged in the notes payable account with the full amount of the loan and the cash account was only debited for 75%. This would put the bankrupt's books out of balance by the amount of the bonuses, so to keep the books in balance the difference between the amount of the note and the actual amount of money received by the copartnership in connection with the loan, was debited to an account in the bankrupt's books known as the Store and Equipment

Account. This Store and Equipment Account taken from the bankrupt's books, is in evidence as Plaintiff's Exhibit No. 9 [Tr. p. 67], and due to the printer's error it is called in the exhibit "Scale and Equipment," but an examination of the testimony of Mr. Young at page 256 and 257 of the transcript clearly shows that it was "Store and Equipment" account instead of "Scale and Equipment."

At page 256 of the transcript Mr. Young, a Public Accountant, explains the way this account was carried, using as an example a $4,000 loan made on January 11, 1940. He testified that the loan was set up by crediting Sun H. Tom's account or notes payable, with the sum of $4,000. [See Plaintiff's Exhibit No. 8, Tr. p. 65, Credit of January 11th to Sun H. Tom $4,000.] He testified that of the $4,000 loan $2980.00 in cash was received by the bankrupt. [Tr. p. 256.] The difference of $1020.00 was debited to the Store and Equipment account and was carried as an asset in the Store and Equipment account. [See Plaintiff's Exhibit No. 9, Tr. p. 67, Entry of $1020.00 debit under date of January 11, 1941.] This is the way all of the loans were handled. Every bonus in favor of Sun H. Tom, which actually constituted a liability, was carried on the bankrupt's books as an asset. [Tr. pp. 256, 257.]

As of March 8, 1941, this Store and Equipment account, consisting of bonuses due to Sun H. Tom, actually showed up on the books of the bankrupt as being an asset of $21,935.72 instead of a liability. An attempt was made at page 164 of the transcript, to get Mr. Young to admit that assuming that the bonuses represented by this Store and Equipment account were illegal and void as being usurious they should be eliminated and would there-

by increase the net worth of the bankrupt copartnership, but Mr. Young pointed out that if the amount carried in the Store and Equipment account as an asset were reduced by the amount of illegal bonuses on the asset side of the ledger, it would be necessary to reduce Tom's credit on the liability side by a corresponding amount, which would still leave the business in the same proportion insolvent. We must therefore eliminate as an asset the item of $21,935.72 carried in the Store and Equipment account.

In so far as the good will was concerned, it was carried as an asset at $21,000. What was the good will of this business worth? We unhesitatingly assert that it was worth little or nothing at all. Among the exhibits introduced in evidence by the plaintiff was a copy of the partnership's income tax return for the calendar year 1940. [Plaintiff's Exhibit No. 4, Tr. p. 47; admitted in evidence, Tr. p. 124.] This income tax return shows that the partnership's gross receipts for 1940 amounted to $384,912.75. The gross profit on that enormous volume of business amounted to only $2730.96. After deduction of expenses a net profit was made, to be divided up among the eleven partners, amounting to $432.07, out of which each of the partners received a munificent dividend of $39.28.

More than that, the copartnership was in serious financial difficulties during the latter part of 1940, and until its bankruptcy in July of 1941. [Plaintiff's Exhibit No. 5, Tr. p. 48, showing the condition of its bank account as digested by counsel, in connection with the appeal to the Circuit Court of Appeals, for the purpose of avoiding the printing of voluminous bank records.] Between March 8, 1941, and July 7, 1941, the four months preceding the

filing of the petition in bankruptcy, 138 overdrafts appeared in this bankrupt's bank account. As the end approached, they increased both in number and in size, consisting of twenty overdrafts in March, ranging from 68¢ to $4211.43; thirty-eight overdrafts in April, ranging from $112.80 to $4664.64; forty-four overdrafts in May, ranging from $1190.21 to $7754.17, and thirty-six overdrafts in June, ranging from a low of $2396.66 to a high of $8487.69.

Sun H. Tom had stopped lending money to the bankrupt copartnership as far back as April 12, 1941, as evidence by Plaintiff's Exhibit No. 6, Schedule 3 [Tr. p. 58], which shows that the last loan he had made, even at a 25% bonus, was a $6,000 loan on April 12, 1941. Thereafter his account shows nothing but collections from the bankrupt copartnership on money previously loaned.

Two of the parties had placed chattel mortgage loans on their cars in order to shore up the crucial condition of the business. The packing house had placed the partnership on a cash basis. [See testimony of Sun H. Tom, Tr. p. 144.] A conference had been held between the defendant, Sun H. Tom, the defendant, York K. Poon and some of the partners, on July 5, 1941 [Tr. pp. 129, 130], at which Poon had informed the conferees, including Sun H. Tom, that the business had been put on a C. O. D. basis. Furthermore, Shoo Hoo Kim Ying, one of the partners, had informed those present at the conference, including both defendants, that he had been informed that the packing house was going to put the bankrupt in the hands of a Receiver the following Monday. [Tr. p. 132.] It was at this conference of July 5th that the preferential and fraudulently inspired payments were made to the defendants. [Tr. pp. 132 *et seq.*] This was on the very

eve of the assignment for the benefit of creditors, which was promptly followed by bankruptcy. The claims listed by the bankrupt copartnership in its schedules, according to the testimony of Paul W. Sampsell, Trustee [Tr. p. 87], amounted to $55,470.20. Those that had been allowed at the time of the trial amounted to $44,301.15, with an additional $12,128.52 of suspended claims which had not been finally determined by the referee. The total amount of assets coming into possession of the Trustee, as summarized by him in Plaintiff's Exhibit No. 10 [Tr. p. 67, received in evidence, Tr. p. 260] amounted to $25,926.03. [See Tr. pp. 69, 70.] The assets listed therein were sold to the highest bidder after having been offered in open court [Tr. p. 68], for the sum of $4,000, to the Ledel Meat Co. [Tr. p. 72.]

At the time of the trial on March 18, 1942, the Trustee had collected from all sources, including money turned over to him by the Receiver, the sum total of $11,611.30, and had nothing left but some receivables of a face value of $3,572.39 [Tr. p. 81] to pay claims amounting to approximately $44,301.15, or possibly more.

Bearing in mind that the question of solvency or insolvency related to the date the amounts represented by the judgment were preferentially paid, July 5, 1941, it certainly cannot be said that a bankrupt facing the black prospects which this business faced on that date, had any good will whatsoever, much less a good will of $21,000 as carried on the books as an asset, whereas in truth, it was nothing but the empty shell of a rapidly disintegrating business. It is immaterial if back in 1935 or '36 the profits of this business were sufficient to justify the carrying of an item of $21,000 as good will. The test of its value was as of the date of the transaction complained of

and not what might have been the condition of the business several years before. The auditor, Mr. Young, an expert accountant, testified that in his opinion, in view of the condition of the business on July 5th, the good will was of no value [Tr. pp. 172 to 177], despite vigorous efforts to shake his testimony on cross-examination. Even the defendants' own witness, Sam Marks, admitted that the fact that the profit made by this partnership for the year 1940 on a $384,912.75 business, amounting to only $432.07, would materially decrease the good will. [Tr. p. 218.] The illustration in Mr. Marks' testimony on recross-examination [Tr. pp. 227, 228] clearly showed the fallacy of carrying the $21,000 item of good will over a period of many years, simply because that had been the original investment made in the business at its inception.

The Law.

We submit that the test of proof of insolvency laid down by the Circuit Court of Appeals for the Ninth Circuit in this case is unreasonable and is contrary to the rule laid down by the Circuit Court of Appeals for the Eighth Circuit in *Rosenberg v. Semple,* 257 Fed. (2d) 72, 43 Am. B. R. 671.

We submit that the Circuit Court of Appeals for the Ninth Circuit has imposed an unreasonable burden on the Trustee in proving insolvency of a partnership consisting of several members, where the parties had vanished to the four corners of the earth.

Section 1, Subd. (19) of the National Bankruptcy Act as amended in 1938 (11 U. S. C. A., §1 (19)), provides as follows:

> "A person shall be deemed insolvent within the provisions of this Act whenever the aggregate of his

> property, exclusive of any property which he may have conveyed, transferred, concealed, removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not at a fair valuation be sufficient in amount to pay his debts."

In the case at bar, as previously pointed out, two of these eleven Chinese partners were in bankruptcy, one in Midway Island in the war zone, one in China, one dead, and the rest had disappeared to destinations unknown even to the manager of the business, York K. Poon, one of the defendants in this action. The Trustee, although he had procured an order marshalling their assets, had been unable to locate any assets. District Judge O'Connor had a right to and did infer from these facts that these partners had no property, or if they did, they had taken it away with them, and were therefore within the provisions of Section 2 of the Bankruptcy Act.

The Circuit Court of Appeals for the Eighth Circuit in *Rosenberg v. Semple,* 257 Fed. 72, 43 Am. B. R. 671, after quoting Section 1, Subd. 19 of the Bankruptcy Act of 1898 as it then existed, said:

> "But direct and detailed evidence of the facts constituting insolvency is not essential. Owing to its nature, insolvency is not always susceptible of direct proof. It may, and in many cases must, be proved by the proof of other facts, from which the ultimate fact of insolvency may be presumed or inferred. Ridge Avenue Bank v. Sturdheim (C. C. A. 3d Cir.), 145 Fed. 798, 16 Am. B. R. 863; Cleage v. Laidley (C. C. A. 8th Cir.), 149 Fed. 346, 17 Am. B. R. 598; Fowler v. Crouse, 175 Fed. 646, 648, 99 C. C. A. 200; Healy v. Wehrung C. C. A. 9th Cir.), 229

Fed. 686, 36 Am. B. R. 673; Grandison v. Robertson (C. C. A. 2d Cir.), 231 Fed. 785, 36 Am. B. R. 452; Grandison v. National Bank of Commerce (C. C. A. 2d Cir.), 231 Fed. 800, 36 Am. B. R. 438.

Notwithstanding the contrary has been urged with much cogency by the attorney for the appellant, we think the evidence in this case, as in those just cited, warrants a finding that the bankrupt was insolvent at the time of the transfer of the accounts to Rosenberg. Moreover, the evidence was in some particulars vague, indefinite, uncertain, and conflicting, and involved questions of credibility. It was taken in the presence of the referee, who expressly found that the bankrupt was insolvent at the time of the transfer."

In arriving at the conclusion that these partners, scattered to foreign countries and unknown destinations, had no property, and considering the fact that no evidence whatsoever was adduced by either of the defendants, to rebut the *prima facie* case presented by the Trustee, Judge O'Connor was supported by a California case which although not binding on this court in a bankruptcy matter, we respectfully submit is of very strong, persuasive authority. We refer to the case of *Wight v. Rolffs,* 48 Cal. App. (2d) 696, in which the court had before it a case involving proof of the question of insolvency in a fraudulent conveyance proceeding. The opinion is rather long, but it lays down a good common-sense rule with regard to the right of a defendant to speculate on what property his fraudulent transferor might have in other states, countries, or jurisdictions. We quote a few excerpts from this case. The case involved a fraudulent conveyance of real property by one Patrick Cahill made approximately ten months

prior to his death. An action was instituted by a creditor to avoid the conveyance under Section 3442 of the Civil Code of California which, at that time made fraudulent and void, voluntary transfers by a debtor in contemplation of insolvency, or while insolvent, of any of his property, at the suit of a creditor existing at the date of the transfer. Judgment was rendered for the defendant on the ground that at the date of the transfer the debtor had sufficient property to pay his debts. The largest portion of this property consisted of an interest in an estate in the State of Massachusetts. In reversing the judgment of the Superior Court the District Court of Appeal laid down the rule that, even though a debtor had property outside of the state, or outside of the country, which could not be reached by the processes of our state courts, such property could not be counted in as a part of his assets to establish solvency. In the opinion the District Court of Appeal quotes with approval some decisions of Appellate Courts in numerous other jurisdictions, from *Corpus Juris* and from *Bump on Fraudulent Conveyances*, 4th Ed., p. 298. We quote:

> "If the property retained is such that it cannot be sold under execution or attachment, or is located in another state, it will not avail. (27 Corpus Juris, 552.) * * * Whether the property reserved is what will be deemed ample does not depend entirely upon the amount and value, as the real end to be accomplished is that the conveyance shall not deprive creditors of the means of collecting their debts. Hence the nature and situation of the property are to be regarded, as well as the amount and value. The property must also be in the state where the donor resides. If it is in some other country, where the creditors cannot reach it, the gift may be set aside.

(Bump on Fraudulent Conveyances, 4th Ed. p. 298.) * * * It follows that a creditor would make a case against a voluntary alienation by his debtor by showing that even if he had means left with which to pay his debts, they were effectually concealed or placed where thy could not be taken, as were in some distant state and not easily obtainable. (Bigelow on Fraudulent Conveyances, Rev. Ed. p. 225.) * * * There is some evidence that he owns some property in the Azores Island. This may be dismissed from consideration, as no court would be heard to say that a workman's compensation for industrial injury shall go to a foreign country for liquidation while the debtor gives away his California property for the reasons of love and affection. (Schwartz v. Brandon, 97 Cal. App. 30, 275 Pac. 448.) * * * Again in Rohrer v. Snyder, 29 Wash. 199, 69 Pac. 748, a creditor, before he is permitted to attack a conveyance which he conceives to be fraudulent, is not obliged to search the entire world for unincumbered property out of which to make his debt. It is sufficient if he finds none within the jurisdiction of the court in which he seeks to set aside the fraudulent conveyance. Other cases holding to the same effect are Baker v. Lyman, 53 Ga. 339; Drake v. Ward-Truitt Co., 149 Ga. 54; Price v. Mazange & Co., 31 Ala. 701."

A careful perusal of this somewhat lengthy opinion certainly will support the inferences drawn by Judge O'Connor that these eleven partners had no property out of which the debts of the copartnership could be satisfied, and with that inference drawn by the trial court we submit an Appellate Court should not interfere.

The Decision of the Circuit Court of Appeals for the Ninth Circuit, in Reversing the District Court, Runs Contrary to the Decision of This Court in Dean v. Davis, 242 U. S. 438, 38 Am. B. R. 664.

The Circuit Court of Appeals for the Ninth Circuit apparently lost sight of the fact that this conveyance of funds to the defendants and certain copartners of the bankrupt, was attacked not only as a preference, but as a fraudulent conveyance under the provisions of Section 67-d, Subd. (2) of the Bankruptcy Act, which reads as follows:

> "Every transfer made * * * within one year prior to the filing of the petition in bankruptcy * * * by or against him is fraudulent (a) as to creditors existing at the time of such transfer or obligation, if made or incurred without fair consideration by a debtor who is or will be thereby rendered insolvent, without regard to his actual intent; or (b) or as to the then existing creditors * * * if made or incurred without fair consideration by a debtor who is engaged or is about to engage in such business or transaction, for which the property remaining in his hands is an unreasonably small capital, without regard to his actual intent; or * * * (d) as to then existing and future creditors, if made or incurred with actual intent, as distinguished from intent presumed in law, to *hinder, delay,* or *defraud* either existing or future creditors." (Italics ours.)

[See Trustee's Complaint, Allegation III, Tr. p. 4; Allegation VI, Tr. p. 5; Allegation VII, Tr. pp. 5, 6; Allegation IX, Tr. pp. 7, 8; Allegation XI, Tr. p. 9.]

In the case of *Dean v. Davis,* 242 U. S. 438, this court held that the taking of chattel mortgage security for a

present consideration, namely, a loan with which the debtor was to effect a preference, constituted a fraudulent conveyance under the provisions of Section 67-e of the Bankruptcy Act as it stood in 1909. In that case the bankrupt, R. Crawley Jones, had become involved with a bank by reason of discounting notes with forged endorsements thereon. The bank was threatening criminal prosecution. R. Crawley Jones wrote his father-in-law informing him of his difficulty, and asking him for a loan to take up the obligation, and informing him that he had sufficient property to more than pay him five times over. (See facts as set out in opinion of the Circuit Court of Appeals for the Fourth Circuit in *Dean v. Davis,* 212 Fed. 88, 31 Am. B. R. 808.) Dean provided the money and took up the notes on September 3, 1909. A mortgage-deed of trust dated September 3, 1909, was executed September 10th and recorded September 11th, covering practically all of Jones' property, the beneficiary being Mr. Dean who provided the money for Jones' father to take up the notes. Crawley Jones went into bankruptcy within four months thereafter. The trustee attacked the conveyance by Bill in Equity, alleging the transaction to be a preference. The District Court held that the transaction did not constitute a preference under Section 60-b of the Bankruptcy Act because given for a contemporaneous or present consideration. (See *Dean v. Davis,* 212 Fed. 88.) The District Court, however, held that though it did not constitute a preference, it *did* constitute a fraudulent conveyance under Section 67-e of the National Bankruptcy Act, and avoided it. The judgment was affirmed by the Circuit Court of Appeals for the Fourth Circuit (212 Fed. 88), which held that, although the conclusion of the District Judge that the mortgage was void was correct, it was void both as a fraudulent conveyance and as a

preference, and affirmed the District Court. This court then granted certiorari, and in the opinion affirming the judgments of both the District Court and the Circuit Court of Appeals, Mr. Justice Brandeis clarified the rule in the following language:

> "The case comes to this court upon appeal, Dean contending that the mortgage is not invalid under either §60-b or §67-e.
>
> The mortgage was not voidable as a preference under §60-b. Preference implies paying or securing a pre-existing debt of the person preferred. The mortgage was given to secure Dean for a substantially contemporary advance. The bank, not Dean, was preferred. The use of Dean's money to accomplish this purpose could not convert the transaction into a preferring of Dean, although he knew of the debtor's insolvency. * * *
>
> But under §67-e the basis of invalidity is much broader. It covers every transfer made by the bankrupt 'within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors,' or any of them' 'except as to purchasers in good faith and for a present fair consideration.' As provided in §67-d, only 'liens given or accepted in good faith and not in contemplation of or in fraud upon this act' are unassailable. A transfer, the intent (or obviously necessary effect) of which is to deprive creditors of the benefits sought to be secured by the Bankruptcy Act, 'hinders, delays or defrauds creditors' within the meaning of §67-e. Van Iderstine v. National Discount Co., 227 U. S. 575, points out the distinction between the intent to prefer and the intent to defraud. *A transaction may be invalid both as a preference*

and as a fraudulent transfer. It may be invalid only as a preference or only as a fraudulent transfer. * * *" (Italics ours.)

Further in the opinion this court says:

"We cannot say that the facts found by the District Court and affirmed by the Circuit Court of Appeals were not supported by the evidence, nor that these courts erred in concluding upon this evidence that the mortgage was made with the purpose and intent to hinder, delay, or defraud Jones' creditors, and that Dean was not, as against general creditors, 'a purchaser in good faith.' Jones knew that he was insolvent. He knew that he was making a preferential payment. He must have known that suspension of his business and bankruptcy would result from giving and recording a mortgage of all his property to secure a note which had matured before the mortgage was executed. The lower courts were justified in concluding that he intended the necessary consequences of his act; that he willingly sacrificed his property and his other creditors to avert a threatened criminal prosecution, and that Dean, who, knowing the facts, cooperated in the bankrupt's fraudulent purpose, lacked the saving good faith."

In the case at bar these defendants, intimately associated with the bankrupt copartnership as manager and bookkeeper, knew that the packers with whom the bankrupt was dealing had cut off its credit; that a meeting of the bankrupt's creditors had been held; that a receivership was impending; that the bank account of the bankrupt was repeatedy overdrawn, and that, following the receivership which was to be invoked the following Monday, bankruptcy would no doubt result. With this inside

knowledge in their possession, on the night of July 5th, they diverted to themselves and certain partners, who shortly disappeared, a total of $4,396.34 of cash collections, pursuant to an arrangement entered into between the defendants Sun H. Tom, York K. Poon and Shoo Hoo Kim Ying, who is now in bankruptcy.

This we submit constituted a conspiracy, confederation and common design which made these defendants as joint tort feasors, each fully responsible to the Trustee for the funds so fraudulently diverted.

As was said by the Circuit Court of Appeals for the Ninth Circuit in *Brainard v. Cohn,* 8 Fed. (2d) 13, 7 Am. B. R. (N. S.) 10:

> "It is also an established rule that, where two or more persons are associated for the same illegal purpose, all engaged in the alleged fraudulent common purpose are as one who has received the property, and each joint tort feasor has the burden of bearing the entire loss which he in cooperation with his fellows has inflicted. Bigelow v. Old Dominion Copper Co., 225 U. S. 111. It follows that remedy may be had against all the tort feasors, or any one of them, subject to the rule that satisfaction once obtained is a bar to further action. The Beaconsfield, 158 U. S. 303. The extent of the remedy may be for the recovery of all the property or its full value."

Conclusion.

We respectfully submit that the Circuit Court of Appeals for the Ninth Circuit in reversing the judgment of the District Court fell into serious error in several respects; first, in holding in substance, that in a partnership bankruptcy where certain of the partners have dis-

appeared or gone to foreign countries outside the jurisdiction of the court, a duty rests on the Trustee to pursue them on the assumption that they, or some of them, might have property in a foreign country which could be used to pay the partnership debts; second, that the action taken by the Trustee seeking to marshal the assets of these disappearing partners into the bankrupt estate and which resulted in nothing, together with the testimony of York K. Poon, their intimate business associate, that he did not know their whereabouts or of any property that any of them had (except for those for whom he accounted as being dead, in China, or Midway Island) established a *prima facie* case which would support the inference drawn by the trial court that none of the partners had property from which the copartnership debts could be satisfied.

We submit that in the face of the fact that no evidence was produced by the defendants to controvert this substantial evidence, the Circuit Court of Appeals for the Ninth Circuit was not justified in reversing the well-reasoned judgment of the District Court that the bankrupt was insolvent. And third, the Circuit Court of Appeals erred grievously in ignoring the decision of this court in *Dean v. Davis, supra,* to the effect that a transfer of money or property on the eve of bankruptcy which, although strictly speaking, might not be regarded as a preference, could, nevertheless, be avoided as a fraudulent conveyance under the provisions of Section 67 of the Bankruptcy Act.

Considering the close fiduciary relationship these defendants bore to this partnership, the speed with which the transfer was consummated, and the circumstances under which the arrangements were made, for the exclusive benefit of the partners, manager and bookkeeper,

we submit this constitutes a very flagrant violation of the National Bankruptcy Act. These men were fiduciaries.

See:

Jackson v. Ludeling, 88 U. S. 616;

Collins v. Hoffman, 74 Wash. 264, 133 Pac. 450.

They owed a duty to the partnership and to its other creditors. They betrayed the other creditors by feathering their own nests, on the eve of the partnership's failure, and we submit that strict proof of insolvency such as is required by the Circuit Court of Appeals' opinion is not required under Section 67 of the Act.

We respectfully submit that the petition for writ of certiorari should be granted, and the judgment of the Circuit Court of Appeals for the Ninth Circuit reversed.

March 3, 1943.

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IN THE

Supreme Court of the United States

October Term, 1942.

No. 814

PAUL W. SAMPSELL, as Trustee in Bankruptcy for the Estate of New Wells Market, a copartnership consisting of Shoo Hoo Kim Ying, *et al.*,

Petitioner,

vs.

SUN H. TOM,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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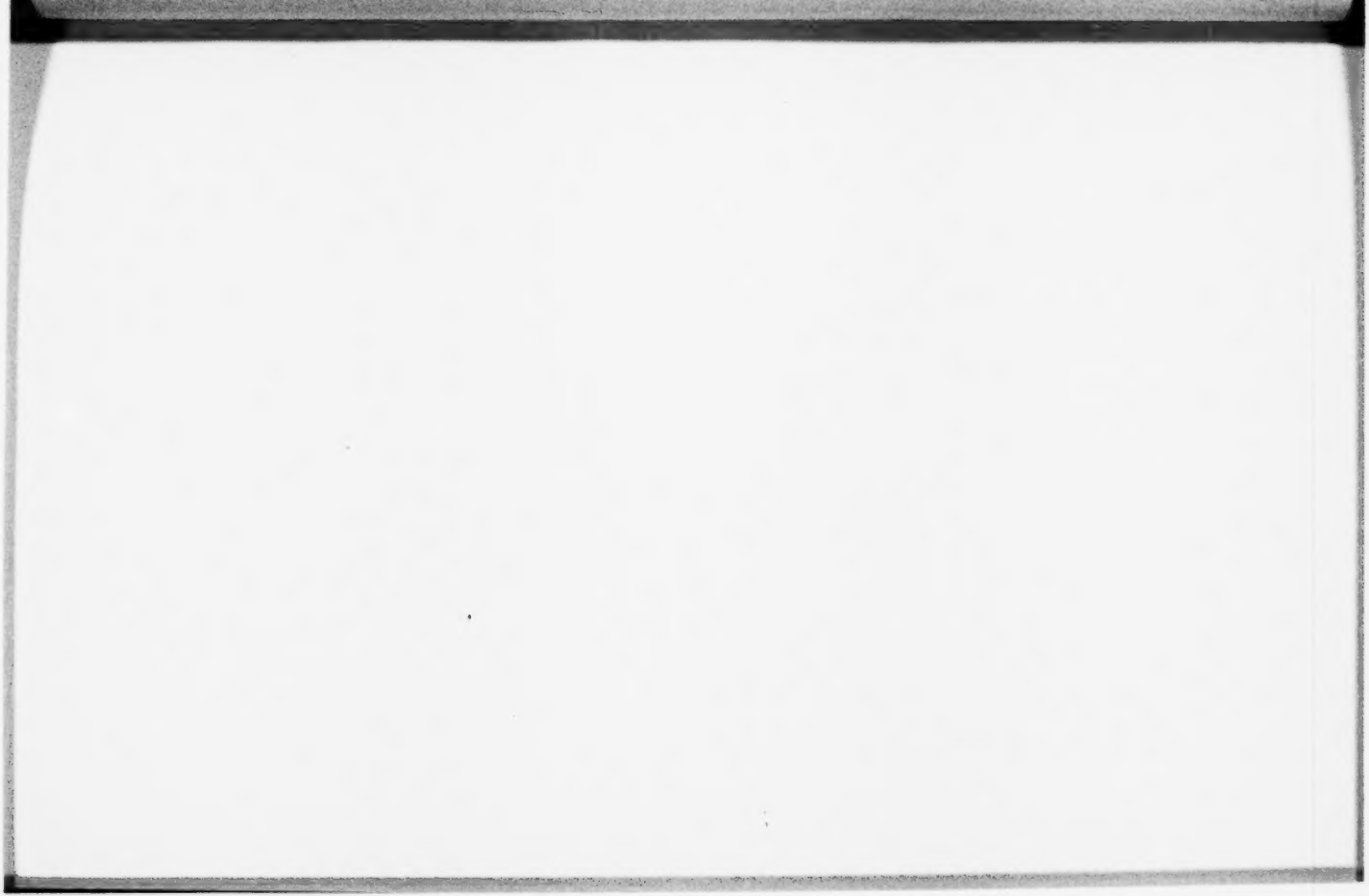

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vs.

SUN H. TOM,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Reference to Official Reports and Statement of Grounds for Jurisdiction.

The Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals is brought before this Court under the provisions of Section 24-c of the National Bankruptcy Act (11 U. S. C. A., Section 47-c), and Section 240 of the Judicial Code (28 U. S. C. A., Section 347).

The jurisdiction of the District Court was invoked under the provisions of Sections 60-b and 67-d of the National

Bankruptcy Act (11 U. S. C. A., Sections 97-b and 107-d), in an attempt to avoid an alleged preferential and fraudulent transfer of the assets of a bankrupt copartnership.

The judgment and decree of the District Court was entered on March 31, 1942. [Tr. p. 38.]

Thereupon the jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit was invoked by Sun H. Tom under the provisions of Section 24-a of the National Bankruptcy Act (11 U. S. C. A., Section 47-a).

The Order of the Circuit Court of Appeals for the Ninth Circuit, reversing the judgment and decree of the District Court was entered on November 30, 1942. [Tr. pp. 275, 276.]

A petition for rehearing was filed by Paul W. Sampsell, Trustee, and was denied by the said Circuit Court of Appeals on December 17, 1942. [Tr. p. 279.]

The Opinion of the Appellate Court will be found in 131 Fed. (2d) 779, and in the Transcript of Record at pages 276 and 277.

Petition Does Not Fall Within the Provisions of Supreme Court Rule No. 38 (5-b).

The Petition for Writ of Certiorari asserts (page 3) that this cause involves a question of far-reaching importance to mercantile and business interests of the country, *on which the Circuit Courts of Appeal are at variance, and involves a unique construction of the partnership provisions of the National Bankruptcy Act by the United States Circuit Court of Appeals for the Ninth Circuit.* (Italics ours.)

This premise is incorrect. The decision of the Circuit Court of the Ninth Circuit is in accord with the decisions of the Supreme Court of the United States, and with all other Circuits in which the point has been passed upon, to-wit:

Francis v. McNeal (C. C. A. 3rd Circuit), 186 Fed. 481, at 484. Affirmed 228 U. S. 695, 57 L. Ed. 1029;

Baker v. Bates Street Shirt Co. (C. C. A. 1st Circuit), 6 Fed. (2d) 854, at 858;

In re Fuller (C. C. A. 2nd Circuit), 9 Fed. (2d) 553-4;

Tumlin v. Bryan (C. C. A. 5th Circuit), 165 Fed. 166;

Vaccaro v. Security Bank (C. C. A. 6th Circuit), 103 Fed. 436, at 441 to 444.

Counsel for Petitioner cites the case of *Rosenberg v. Semple*, 257 Fed. 72 (C. C. A. 8th Circuit), as being opposed to this general rule. However, a reading of that case will show first, that it has nothing to do with a partnership bankruptcy, and second, that it merely reiterates the well-known policy of Courts of Appeal not to disturb findings made upon conflicting testimony. It certainly has no bearing on the instant case, and cannot, by the greatest stretch of the imagination, be said to be at variance with the decision of the Ninth Circuit Court or of the other Circuit Courts above mentioned. So, we respectfully submit that if the Supreme Court follows the usual practice as outlined in Supreme Court Rule No. 38 (5-b), the Petition for Certiorari should be denied.

Correction of Inaccuracies and Misstatements of Evidence in Petitioner's Petition for Writ of Certiorari.

There are misstatements of the evidence which we feel should be pointed out. For instance, at page 7 of the Petition, the statement is made that:

> "To make the situation even more crucial, a meeting of creditors was called on July 5, 1941, which was attended by York K. Poon, the manager, and Shoo Hoo Kim Ying. They were informed at that meeting that the store was going to be closed the next day. [Tr. pp. 98, 99.] The partnership had theretofore been placed on a C.O.D. basis by creditors." [Tr. pp. 101, 102.]

This statement is without foundation. There was no meeting of creditors on July 5th, 1941. There was a meeting of creditors on July 1st or 2nd, 1941, at which York K.

Poon and Shoo Hoo Kim Ying were present. [Tr. p. 202.] They were not informed at that meeting that the store was going to be closed; instead, it was agreed between the copartnership and the creditors that the old debts would be frozen, and that the copartnership should go on a C. O. D. basis commencing the following Monday, and that the copartnership was to continue business on that basis. [Tr. pp. 202, 203.] The first intimation that the copartnership might not be allowed to so continue business on a C. O. D. basis, came about July 5th, 1941, and such intimation did not come from the creditors, but came in an indirect manner when Shoo Hoo Kim Ying went out to collect accounts receivable in the usual manner, and was informed by several debtors of the copartnership that they would not pay for the reason that they understood the packers were going to put a Receiver in charge of the market. [Tr. pp. 98, 99, 103, 112, 113, 132.]

Again, on page 8 of the Petition the statement is made that:

> "A conference was held on the evening of July 5, 1941, which resulted in the disbursal of funds on hand * * *".

This is another statement not supported by the record. The testimony of Sun H. Tom [Tr. pp. 129, 130, 131, 132] shows that there was no conference held, but that the only thing that happened was that the Managing Copartner, Shoo Hoo Kim Ying, brought in certain collections, ordered Sun H. Tom the bookkeeper to enter them in the books, and then called in York K. Poon, the Manager of the store, and told him that the packers had "double-crossed" him, and that he should take the money and pay off the employees.

Again, on page 8 of the Petition, the statement is made that:

> "The judgment of the District Court was reversed *solely* (italics ours) on the ground that the Trustee had failed to prove insolvency on July 5, 1941".

This statement is incorrect also. The judgment was reversed on *three* grounds, to-wit: (1) no proof of insolvency; (2) no proof that Sun H. Tom entered into a conspiracy; and (3) no proof that the payments were made pursuant to a conspiracy. [See the last paragraph of the Opinion of the Circuit Court, Tr. p. 277.]

Correction of Inaccuracies and Misstatements of Evidence in Petitioner's Brief, and Argument Thereon.

The inaccuracies and misstatements continue on into the Petitioner's Brief. On page 11 of the said Brief, the statement is made that the partnership consisted of nine Chinamen. The true fact is that there were eleven co-partners.

Then, on page 12, there is a statement made which is not borne out by the record. Counsel for Petitioner says (p. 12 of his Petition and Brief):

> "The Trustee put an adjuster in his office to work seeking to locate *assets* (italics ours) of these individual copartners * * *." [Tr. pp. 85, 86.]

This statement is contrary to the record. A reading of said pages of the record indicates clearly that all the Trustee did was to turn the marshalling order over to one of his adjusters to try to locate the partners, and that he was not able to find them. Counsel for Sun H. Tom

questioned at length to try to find out just what was done to ascertain what property the individual partners had [Tr. pp. 84 to 86, incl.], and it is apparent that all the Trustee did was to turn the matter over to an adjuster to try to locate the partners, and the adjuster could not find them. We quote from the Transcript, pages 85 and 86:

> "Q. By Mr. Gardner: Then do I understand, Mr. Sampsell, that all that was done in the matter of trying to get any assets from these partners is that you turned the matter over to an adjuster? A. To the adjuster, to try and locate them. And he reported back to me that he couldn't locate them.
>
> Q. He couldn't find them? A. That is right.
>
> Q. He couldn't locate these Chinamen? A. That is right; he couldn't locate these Chinamen."

There is no proof that he searched for property; there is no proof that the partners individually did not have property. The mere getting of the marshalling order itself is not sufficient, particularly in this case, where it is evident from the order itself that it was obtained upon a published summons, and the partners had no actual notice of the proceeding. [Tr. pp. 45, 46.]

Then, again, on page 13 of the Petition and Brief, Counsel for Petitioner makes statements to the effect that York K. Poon testified [Tr. pp. 91 *et seq.*] that he did not know of any property that the individual partners had. Such statements may be misleading. A reading of the testimony of York K. Poon [Tr. pp. 91 to 94, incl.] shows that what York K. Poon really said was that he did not know whether the various partners had property or not; not that he knew of no property that any of them had. We think there is considerable difference in the meaning

of the two statements. The first indicates a lack of knowledge as to whether or not the copartners did or did not have property; the latter would indicate a definite knowledge that he knew they had no property. What York K. Poon testified was, in effect, that he had no knowledge either way, and such testimony on his part would have no bearing on the question of fact as to whether the partners did have property. It would neither prove nor disprove, and certainly could not be used by the Petitioner here as proving a *prima facie* case. The mere fact that York K. Poon did not know whether or not they had property, is no proof that they did not have property. Insolvency is certainly not presumed. And if any presumption is to be drawn in the matter, the fact that the partners could not be located would more likely indicate that they did have property which they were reluctant to see fall into the Trustee's hands, rather than that they did not have property.

It all boils down to this: That it was a difficult task to prove that the copartners themselves did not have property, and that therefore, since it was difficult, the Court should excuse his failure to prove this absolutely essential element of his case, and give him judgment anyway. You might as well say that in a murder case, where it is essential to prove the corpus delicti, the State could fail to prove the corpus delicti and say, "Well, it was too difficult to prove, but let's hang this defendant anyway, on general principles!"

Petitoner's Analysis of Items of Store and Equipment Account and Good Will Account Is Fallacious.

From page 15 to page 20 of his Brief, Counsel for Petitioner devotes considerable time in trying to show that the copartnership standing alone, was insolvent as of July 5th, 1941. However, the only evidence tending to show what assets and liabilities the copartnership itself had, at any time near to July 5th, 1941, was the evidence of S. Marks, the auditor for the Assignee, who made an audit as of July 5th, 1941. [Tr. pp. 75, 76, 210 to 214, incl.] This audit showed a net worth of $3,898.79. [Tr. pp. 76, 212, 213.] True, there was included as an asset an item of $21,000.00 of goodwill, which perhaps in view of the assignment had no value; however, it also included as a liability the notes owing to Sun H. Tom, carried on the books at $27,059.00 [Tr. pp. 32, 66], of which approximately $22,000.00 consisted of bonuses [Tr. pp. 32, 231, 232], which were illegal and void under the California Usury Law, and could not therefore be considered as a legal debt; so, even if the goodwill of $21,000.00 had no value, it was more than balanced by the fact that approximately $22,000.00 of the alleged debts were in fact illegal and void and could not be enforced. There appears to be no doubt but that the bonuses were void and uncollectible under the California law. We cite the following:

Jones v. Dickerman, 114 Cal. App. 357, at 361-2;

Babcock v. Olhasso, 109 Cal. App. 534, at 537;

Layport v. Rieder, 94 Pac. (2d) 96, at 98;

Layport v. Rieder, 37 Cal. App. (2d) 742, at 747;

French v. Mortgage Guarantee Co., 16 Cal. (2d) 26, at 32;

Penziner v. West American, 10 Cal. (2d) 160, Syls. 4 to 15.

If, therefore, the sum of approximately $22,000.00 of the so-called debts of the copartnership, were not in fact legal or enforceable debts, then such illegal and unenforceable debts cannot be considered in determining the amount owed by the copartnership.

Tennessee Co. v. Thompson (C. C. A. 6th Circuit), 278 Fed. 597, at 601;

LeSueur v. Manufacturers Finance (C. C. A. 6th Circuit), 285 Fed. 490, at 498.

So, if such $22,000.00 was not an enforceable debt, then the copartnership in fact owed $22,000.00 less than the amount shown in Mr. Marks' financial statement, and even if the good-will of $21,000.00 was entirely eliminated, there would still be a net worth of over $3,000.00.

And as to Counsel's contention that because the "Store and Equipment Account" included the bonuses to Sun H. Tom, it was fictitious and should not be counted as an asset but as a liability, the fallacy of this contention lies in the fact that such an assumption fails entirely to take into consideration the undisputed fact that the copartnership did have equipment and fixtures which had cost approximately $30,000.00 about two years previous [Tr. pp. 180 to 184, incl.], and that the only place on Mr. Young's audit where this equipment is shown is in the "Store and Equipment Account" [Tr. pp. 166, 167], and that the Trustee in Bankruptcy himself valued this equipment at $25,926.03. [Tr. p. 70.] We must bear in mind that we are not concerned with whether the books of the copartnership were kept in the ordinary and established way or not; we are concerned with the actual fact of solvency or insolvency. As a matter of fact, the method of keeping

the books was far from orthodox. If they had been kept in the proper manner, the "Store and Equipment Account" would have reflected the $30,000.00 worth of fixtures and equipment, less two years' depreciation, and the bonuses of Mr. Tom would have been set up as "Deferred Interest", or some such heading. However, no matter how the books were kept, we think the Court should take into consideration the fact that it is undisputed that the copartnership did own fixtures and equipment which two years previous had cost approximately $30,000.00, and that the only place in Mr. Young's audit where there is any reflection of fixtures and equipment is in the "Store and Equipment Account". [Tr. pp. 166, 167.] Therefore, there is no merit in Counsel's argument that the "Store and Equipment Account" was a fictitious account and should not be counted as an asset.

As for the matter of the value of the good-will, it would seem that $21,000.00 is not an exorbitant figure to set for good-will in a going business that has carried on successfully for ten or eleven years [Tr. pp. 95, 107], doing a gross business of approximately $400,000.00 per year [Tr. p. 238], and with an average annual profit of between $5,000.00 and $10,000.00 [Tr. pp. 236, 237], even though the business only made a profit of $432.07 during the last year of its existence. [Tr. p. 48.] As we pointed out heretofore, however, if we eliminate the void and uncollectible bonuses (which of course must be eliminated as a liability because under the California law they were void and uncollectible), then the copartnership itself was still solvent even though the item of good-will is valued at nothing.

Test of Insolvency Used by Circuit Court Is Not at Variance With Other Circuits or the Supreme Court.

On page 20 of his Petition, Counsel states that the test of proof of insolvency laid down by the Circuit Court of the Ninth Circuit is unreasonable and contrary to the rule laid down in the case of *Rosenberg v. Semple,* 257 Fed. 72. The test laid down by the Circuit Court of the Ninth Circuit was the same test laid down in the cases of *Francis v. McNeal, Baker v. Bates Street Shirt Co., In Re Fuller, Tumlin v. Bryan,* and *Vaccaro v. Security Bank,* heretofore cited herein. It is the only test that can be laid down in a partnership case. The case of *Rosenberg v. Semple* is not in point because it had nothing to do with a partnership, and a careful reading of it discloses that the only thing it decides is to once again lay down the rule that where there is a *conflict* of testimony the Appellate Courts will not disturb the findings of the lower court in regard thereto. In the case at bar, there was no *conflict* of testimony; there was a complete *lack* of testimony as to the absolutely essential point of whether or not the individual partners had property. There was nothing from which even an inference could have been drawn by the District Court that the individual partners had no property.

The Case of Wight v. Rolffs Is Not in Point Because Based on a Special California Statute Defining Insolvency Differently Than the Definition Used in Bankruptcy.

On page 22 of the Petition and Brief, Counsel cites the California case of *Wight v. Rolffs,* 48 Cal. App. (2d) 696. Counsel quotes at length from said case. But that case was one brought under special Code provisions of the State of California, wherein a special definition of insolvency is given which is different from the definition of insolvency as used in bankruptcy matters. We call the Court's attention to the following quotation from the case of *Wight v. Rolffs,* at page 699:

> "Section 3450 of the Civil Code declares: 'A Debtor is insolvent, within the meaning of this title, when he is unable to pay his debts *from his own means, as they become due*' (italics ours). In determining the issue of a Debtor's solvency under said Section, in cases of this kind, it is held that only such assets as are subject to Court process at the time of the making of the alleged fraudulent conveyance may be considered; and that even though 'A man controlling property out of which he may voluntarily pay his debts if he will, but which for any reason cannot be reached by process of law and thus without his consent subjected to such payment, is nevertheless insolvent.' "

The case of *Wight v. Rolffs* is brought under a special section of the California Code, which defines, for the purposes of actions brought under said sections, insolvency in a way which is different from the definition of insolvency

used in ordinary bankruptcy matters. The State conception of insolvency follows the old equity definition; in Bankruptcy, the test is different (Bankruptcy Act, Sec. 1 (19), viz:— the assets at a fair valuation are insufficient to pay the debts. That case has no bearing on any situation not brought with the purview of those particular Code provisions.

No Proof of Any Intent to Hinder, Delay or Defraud Creditors, so Cases of Dean v. Davis and Brainard v. Cohn Not in Point.

On page 25 of his Brief, Counsel states that the Circuit Court lost sight of the fact that the transaction was attacked not only as a preference, but also as a fraudulent conveyance under the provisions of Section 67-d, Subd. (2) of the Bankruptcy Act. He quotes from said section at some length, but does not quote the equally binding portion of said Section 67-d, contained in Subdivision 1 (d), which reads as follows:

> "A person is 'insolvent' when the present fair salable value of his property is less than the amount required to pay his debts; *and to determine whether a partnership is insolvent, there shall be added to the partnership property the present fair salable value of the separate property of each general partner in excess of the amount required to pay his separate debts.* * * *"

It seems apparent that the Circuit Court did not overlook the fact that the transfer was attacked as a fraudulent

conveyance; otherwise, the Circuit Court would not have stated as it did, in its Opinion [Tr. p. 277]:

> "* * * Nor was there any proof that he entered into a conspiracy, or that the payments were made pursuant to a conspiracy."

The Circuit Court considered that phase of the case, and determined that not only was there no proof of insolvency, but that also there was no proof of any conspiracy. This being so, the cases of *Dean v. Davis* and *Brainard v. Cohn*, cited by Counsel for Petitoner, have no bearing.

Sun H. Tom Not a Fiduciary, and Not a Party to Any Conspiracy.

Counsel contends at pages 30 and 31 of his Brief, that Sun H. Tom was a fiduciary. There is no evidence to support such a contention. Tom was only an employee, to-wit, the bookkeeper [Tr. pp. 95, 108, 123, 190], and a large creditor because of loans made. He took his orders from York K. Poon, the Manager, and Shoo Hoo Kim Ying, the Managing Partner. [Tr. p. 108.] He had no part in the distribution of the money on the evening of July 5th, 1941, and such distribution was made by York K. Poon, the Manager, at the order of Shoo Hoo Kim Ying, the Managing Partner. [Tr. p. 131.] Tom was paid $1,246.28 to apply on the moneys owed to him. [Tr. p. 32.] After crediting this amount, the copartnership still owed him $5,219.00 from moneys actually loaned. [Tr. pp. 230, 247.] Tom had nothing to say as to how

the money was paid out. All he did was to take the amount which York K. Poon and Shoo Hoo Kim Ying decided to pay him to apply on his notes. He was not a joint *tort feasor* with York K. Poon and Shoo Hoo Kim Ying. His only sin was that he was paid something on account of the just debt owing to him. Bear in mind that he received nothing on account of the bonuses, and that the copartnership still owes him $5,219.00 of cash money actually advanced to them by him. There was no evidence that he was a party to any conspiracy, or that he had any intent to hinder, delay or defraud anybody. The Circuit Court so concluded when it rendered its opinion [Tr. p. 277] that not only was there no proof of insolvency, but that there was no proof that Tom entered into any conspiracy, or that the payments to him were made pursuant to any conspiracy.

We therefore submit that the Petition for Writ of Certiorari should be denied.

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